Golden Coach, A.C., Inc. *and* Amalgamated Transit Union Division 880, AFL-CIO. Case 4-CA-12300

January 31, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 30, 1982, Administrative Law Judge William A. Pope II issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Golden Coach, A.C., Inc., Ventnor, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

WILLIAM A. POPE II, Administrative Law Judge: In a complaint issued on September 16, 1981, the Regional Director for Region 4 alleged that the Respondent, Golden Coach, A.C., Inc. (herein Golden Coach or Respondent), engaged in an unfair labor practice, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by refusing to bargain with the Amalgamated Transit Union Division 880, AFL-CIO (herein the Charging Union or the Union), as the exclusive collective-bargaining representative of Golden Coach's employees. The hearing was held on June 21, 1982, in Philadelphia, Pennsylvania, before me.

I. ISSUES

The issues in this case are:[1]

(1) Did Respondent violate Section 8(a)(1) and (5) of the Act by refusing to bargain with the Charging Union on the ground that it no longer possessed a majority?

(2) May the Respondent litigate in this proceeding the question of the appropriateness of the bargaining unit which was previously litigated at a representation hearing and decided against the Respondent by the Regional Director?

The Respondent argues that at the time of the Regional Director's Decision and Direction of Election it did not have in its employ a representative complement of employees, and, therefore, the Regional Director's finding that the bargaining unit was appropriate was premature, and his direction that the election proceed was erroneous. In the Respondent's view, the appropriate bargaining unit consists of the bus drivers employed by the Respondent at both of its locations, not just the drivers at its location in Ventnor, New Jersey, as decided by the Regional Director. Thus, reasons the Respondent, the lack of a representative complement of employees, coupled with evidence of the Charging Union's loss of the employees' support, in the form of a petition signed by all of the employees stating that they did not wish the Charging Union to represent them, was sufficient to establish the existence of "unusual circumstances" which justified the Respondent's refusal to bargain with the Union.

The General Counsel, on the other hand, argues that there were no extraordinary circumstances which justified the Respondent's refusal to bargain with the recently certified union. The General Counsel takes the position that it is well established that defections by employees cannot unseat a bargaining representative within 1 year of its certification, and that it was the Respondent's obligation to bargain with the Union for 1 year from the date of certification, employee turnover notwithstanding. Further, contends the General Counsel, there are no newly discovered or previously unavailable evidence or special circumstances which would entitle the Respondent to relitigate the issue of the appropriateness of the bargaining unit, which was raised and decided in the representation proceeding. I agree.

II. BACKGROUND

Golden Coach, the Respondent in this case, and Leisure Time Tours are two bus companies owned and operated by Golden Nugget, Inc. Golden Coach, operating buses displaying the legend, "Golden Nugget," offers round trip bus service from Philadelphia, Pennsylvania, and points in northern New Jersey, to the Golden Nugget and other gambling casinos in Atlantic City, New Jersey. Golden Coach's buses are dispatched from a facility in Ventnor, New Jersey. The Company began operations in late 1980 or early 1981. Operating mainly from a facility in Mahwah, New Jersey, Leisure Time Tours, which has been in business for several years, provides bus service to and from New York City for commuters, bus transportation from points in northern New Jersey to and from various gambling casinos in Atlantic City, and charter service. It also operates bus runs on occasion from Golden Coach's Ventnor, New Jersey, facility. The affairs of both companies are managed and administered by the parent corporation, Golden Nugget, Inc., from offices in Mahwah, New Jersey.

[1] Respondent amended its answer on June 7, 1982, to admit that it has at all times material herein been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

Following a hearing before a hearing officer of the National Labor Relations Board,[2] on April 20, 1981, the Regional Director for Region 4 issued a Decision and Direction of Election, finding all full-time and regular part-time bus drivers and mechanics employed by the Respondent to constitute an appropriate collective-bargaining unit, and directing that a secret-ballot election be conducted among the employees to determine if they desired to be represented for collective-bargaining purposes by the Charging Union. According to the tally of ballots, issued May 20, 1981, the employees voted 12 to 1, with 1 challenged ballot, in favor of representation by the Charging Union. The results of the election were certified by a Certification of Representation dated May 29, 1981.

Following preliminary contacts and discussions between representatives of the Respondent and the Charging Union, a meeting of the two sides was scheduled to be held in the offices of Carl G. Coben, Respondent's attorney, on August 4, 1981. By telegram from Carl G. Coben to Charles Dannenhauer, president of Amalgamated Transit Union Division 880, dated August 3, 1981, the Respondent notified the Charging Union that it was canceling the meeting because it was in receipt of a petition executed by all employees stating that they did not wish to be represented by the Union.[3] The Respondent has refused to recognize or bargain with the Charging Union since then.

III. FINDINGS AND CONCLUSIONS

At issue here is whether, as argued by the Respondent, "unusual circumstances," in this instance, allegedly, an apparent repudiation by the employees of their certified union,[4] a lack of a representative complement of employees in the bargaining unit at the time of the election leading to certification,[5] and an inappropriate bargaining unit,[6] justified the Respondent's refusal to bargain with the Union during the 1 year following certification. I find no merit to the Respondent's claim that it was justified in unilaterally refusing to bargain with the Union.

The question here is not whether a new election could be ordered, or even whether the Board, in its discretion, could revoke the Union's certification, under the proper circumstances. In the first place, no petition has been filed with the Board for a new election on the ground that the Union in this case no longer is representative of a majority of the employees, as provided in Section 9(c)(1)(A),[7] and, in the second place, even if there was such a petition, it would be ineffective, because Section 9(c)(3) precludes such an election within a 12-month period following a valid election.[8] Beyond that, whether or not the Union's certification could be revoked by the Board without the ordering of a new election also is not an issue in this case, because we are concerned here with the Respondent's unilateral refusal to bargain, which was taken on its own initiative and authority, without any attempt to first petition the Board for relief. The question, therefore, is simply one of whether the Respondent was required to honor the certification or whether there were "unusual circumstances" justifying its disregard of the certification.

This case turns on the decision of the Supreme Court in *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954), a case which both parties have cited, but in support of opposite conclusions. The facts of that case are analogous in many respects to those of the instant case. There, a week after an election and the day before certification, the employer received a petition signed by 9 of 13 employees stating they were not in favor of being represented by the union. The employer, who was the petitioner in the case, thereafter refused to bargain with the union, and the issue before the Court was whether the National Labor Relations Board's bargaining order should be enforced. In holding that the Board was entitled to an order of enforcement, the Court stated:

> If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit. Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge of an unfair labor practice, these are matters for the Board; they do not justify employer self-help or judicial intervention.
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[2] The hearing was held in Atlantic City, New Jersey, on March 26, 1981. Participating by counsel or representative in the hearing were the Respondent and the Charging Union.

[3] The petition received in evidence bears 24 signatures opposite a typewritten list of 26 names, identified in the petition as Golden Coach drivers. According to the body of the petition, the drivers wished to withdraw their membership from the Charging Union, because it had not negotiated with their best interests in mind, and was not looking after the economic needs of its members.

[4] The petition upon which the Respondent relies to establish this point was apparently received by mail. There is nothing in the record establishing the circumstances under which the petition was prepared and signed, or who transmitted it to the Respondent. Nor does the record clearly establish the authenticity of the signatures.

[5] Robert J. Davis, the Respondent's general manager, testified that between April 23, 1981, and June 6, 1982, the number of employees employed by the Respondent at its Ventnor, New Jersey, facility increased from 18 to 60. On August 2, 1981, 2 days before the scheduled bargaining meeting canceled by the Respondent, there were 30 employees.

[6] Arguing that the Respondent and Leisure Time Tours are a single, integrated enterprise operated by the parent company, Golden Nugget, Inc., the Respondent concludes that the appropriate unit for collective-bargaining purposes consists of the bus drivers employed at both the Ventnor and Mahwah facilities (which would include the drivers employed by the Respondent and Leisure Time Tours). Even though the appropriateness of the bargaining unit issue was litigated in a representation hearing and decided by the Regional Director, the Respondent argues that it is entitled to relitigate the issue before the administrative law judge because it is the first and only adversary proceeding to which it is entitled.

[7] Sec. 9(c)(1)(A) authorizes the filing of such a petition by an employee, a group of employees, or any individual or labor organization acting in their behalf. There is no similar authority vested by statute in an employer.

[8] The election leading to the Union's certification was held on or about May 20, 1981. The Respondent's refusal to bargain occurred on or about August 3, 1981, less than 3 months later. Sec. 9(c)(3) of the Act provides that:

> No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

> It is contended that since a bargaining agency may be ascertained by methods less formal than a supervised election, informal repudiation should also be sanctioned where decertification by another election is precluded. This is to make situations that are different appear the same.[9]

In subsequent cases, the Board has consistently held that the apparent repudiation by a majority of employees of their certified collective-bargaining representative does not justify an employer's refusal to bargain with a union during the 1-year period after its certification.[10] Similarly, the Board has consistently held that employee turnover does not justify an employer's refusal to bargain.[11] The Board has said that "elections are decided by a majority of the valid votes cast so long as a representative complement of eligible employees participated in the election."[12] In the instant case, there is no question but that a representative complement of the eligible employees then employed by the Respondent participated in the election which resulted in the certification of the Charging Union. Indeed, of 14 eligible voters at the time, 12 voted in favor of the Union as their collective-bargaining representative. Since a representative complement of employees clearly participated in the election, it is of no relevance that shortly thereafter there may have been a turnover of employees or an expansion of the number of employees, giving rise to the Respondent's claim that by refusing to bargain it was merely protecting the rights and wishes of the current majority of its employees. As stated by the Supreme Court in *Ray Brooks* v. *N.L.R.B., supra:*

> The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.[13]

I conclude, therefore, that the Respondent unlawfully breached its duty to bargain in good faith with the Charging Union, which had been certified by the Board as the collective-bargaining representative of its employees, during the 1-year period following certification. Neither an apparent subsequent repudiation of the certified Union by the employees, nor a turnover among or increase in the number of employees, justified the Respondent's unilateral decision to withdraw recognition and refuse to bargain. The Respondent is not guardian of the rights of its employees in the sphere of labor relations, and it lacked any right to substitute its judgment for that of Congress and the National Labor Relations Board, in which Congress vested the responsibility for overseeing the resolution of disputed questions of representation. The Respondent has failed to produce any evidence of unusual circumstances which would justify it to resort to self-help measures completely by passing the procedures established by law to resolve disputed questions of representation. Accordingly, I find that by refusing on and after August 3, 1981, to bargain collectively with the Charging Union as the certified representative of its employees Respondent engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

In cases such as this, in which an employer has committed an unfair labor practice by refusing to bargain with the certified representative of its employees during the year following certification, the Board construes the initial period of certification to being on the date the employer commences to bargain in good faith with the union as the recognized bargaining representative.[14]

Finally, the Respondent's claim that the bargaining unit was inappropriate does not raise a litigable issue in this proceeding. This precise issue was litigated in a prior representation hearing and was decided against the Respondent by the regional director. Despite being advised of its right to appeal that decision to the Board, the Respondent failed to do so. As often stated by the Board in such situations:

> It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[15]

All of the issues raised by the Respondent in this proceeding concerning the appropriateness of the bargaining unit were or could have been raised in the prior representation proceeding. The Respondent has failed to offer any newly discovered evidence or previously unavailable evidence; indeed, the evidence upon which the Respondent relies in this proceeding was drawn almost in its entirety from the transcript of the prior representation hearing held on March 26, 1981. Further, the Respondent has not pointed out any special circumstances in this case which would warrant the extraordinary action by the Board of reexamining the unappealed decision of the Regional Director. I find, therefore, that the Respondent has not properly raised any issue concerning the appropriateness of the bargaining unit in this unfair labor practice proceeding.

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[9] 348 U.S. at 103-104.

[10] A Union's continued majority is conclusively presumed to exist for 1 year from the date of certification and an employer is obligated to bargain in good faith for at least that year. *Affordable Inns, Inc., d/b/a Regal 8 Inns,* 222 NLRB 1258 (1976); *Automatic Plastic Molding Company,* 234 NLRB 681 (1978); see also *Cocker Saw Corporation, Inc.,* 186 NLRB 893 (1970); *Lexington Cartage Company, Inc.,* 259 NLRB 55 (1981).

[11] An employer's obligation to bargain extends for 1 year from the date of certification and employee turnover does not constitute "unusual circumstances." *Diamond Crystal Salt Company,* 222 NLRB 714 (1976); *S. Prawer & Company,* 232 NLRB 495 (1977); *Kustom Electronics, Inc.,* 230 NLRB 1037 (1977).

[12] *Regal 8 Inns, supra,* 222 NLRB at 1259.

[13] 348 U.S. at 103.

[14] *Diamond Crystal Salt Company, supra; Eckerd Drugs of Georgia, Inc.,* 248 NLRB 151 (1980); *Kustom Electronics, Inc., supra.*

[15] *Regal 8 Inns, supra,* 222 NLRB at 1259; *Diamond Crystal Salt Company, supra; Eckerd Drugs of Georgia, Inc., supra.*

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent committed an unfair labor practice, within the meaning of Section 8(a)(1) and (5) of the Act, by on or about August 3, 1981, and continuously thereafter, withdrawing recognition of the Amalgamated Transit Union Division 880, AFL-CIO, as collective-bargaining representative of Respondent's full-time and regular part-time bus drivers and mechanics, and failing and refusing to bargain collectively with the Union as the representative of its said employees.

3. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in an unfair labor practice, I find it appropriate to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having committed an unfair labor practice by withdrawing recognition of the Union as collective-bargaining representative of its full-time and regular part-time bus drivers and mechanics, and by refusing to bargain collectively with the Union as exclusive representative of all employees in the aforesaid appropriate bargaining unit, shall be ordered to cease and desist therefrom, and, upon request, to bargain collectively with the Union, and, if an understanding is reached, to embody such understanding in a signed agreement.

As a means of insuring that the employees in the bargaining unit will be accorded the services of their bargaining agent for the period provided by law, the initial 1-year period of certification shall begin on the date the Respondent commences to bargain in good faith with the Union as the recognized collective-bargaining representative of the Respondent's full-time and regular part-time bus drivers and mechanics.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[16]

The Respondent, Golden Coach, A.C., Inc., Ventnor, New Jersey, its officer, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize Amalgamated Transit Union Division 880, AFL-CIO, as the collective-bargaining representative of its full-time and regular part-time bus drivers and mechanics.

(b) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Transit Union Division 880, AFL-CIO, as the exclusive bargaining representative of its full-time and regular part-time bus drivers and mechanics, who constitute an appropriate bargaining unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Ventnor and Mahwah, New Jersey, facilities copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply with its terms.

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT refuse to recognize Amalgamated Transit Union Division 880, AFL-CIO, as the collective-bargaining representative of our full-time and regular part-time bus drivers and mechanics.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Transit Union Division 880, AFL-CIO, as the exclusive bargaining representative of our full-time and regular part-time bus drivers and mechanics, who constitute an appropriate bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain with the above-named labor organization as the exclusive representative of all of our employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreeement.

GOLDEN COACH, A.C., INC.